

January 30, 2015

## **SUPPLEMENT TO SUMMARY OF SUBJECT MATTER**

TO: Democratic Members, Committee on Transportation and Infrastructure  
FROM: Democratic Staff, Subcommittee on Water Resources and Environment  
RE: Hearing on “Impacts of the Proposed Waters of the United States Rule on State and Local Governments”

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This supplemental memo is to provide additional background information relevant to this hearing.

### **LEGAL BACKGROUND**

The legal context of the “waters of the United States” issue is framed by: (1) the statutory language of the Clean Water Act (CWA); (2) the Federal agency regulations and implementation guidance that further define terms within the Act, and; (3) by the judiciary, including a series of recent cases by the U.S. Supreme Court.

In terms of the statutory language, the Act does not definitively describe the outer reaches of the CWA jurisdiction, but uses broad terms, such as “waters of the United States,” and allowed those Federal agencies (the Corps and EPA) with statutory authority to implement the Act to further define these terms through rulemaking and other administrative means. In essence, the decision by the Congress and the Federal agencies to utilize broadly-defined terms was a conscious one, allowing the Act to establish a general framework of coverage, without having to develop a specific definitional test that could have been inconsistent with the regional and climatic variability of waters and wetlands throughout the United States.

From the 1970s through 2001, the prevailing legal theory was that the CWA, like many other Federal environmental statutes, was to be applied broadly – arguably to the limits of the Commerce Clause of the U.S. Constitution. However, in 2001 (with the *SWANCC* decision) and again in 2006 (with the *Rapanos* decisions), the Supreme Court for the first time suggested some limit to the scope of the CWA; yet, the Court did not clearly define what that limit might be.

In *SWANCC*, the Court concluded only that the Corps could not use the presence of migratory birds as the sole reason for asserting jurisdiction over so-called isolated, intrastate waters.

In *Rapanos*, the Court issued a 4-1-4 decision that, again, did not articulate a clear limit to the scope of the Act. Instead, the Court produced three distinct opinions that outlined three separate analyses for determining the Act’s scope. However, because a majority of the justices did not agree on any single test for determining CWA jurisdiction, the Federal agencies (and the lower courts) have no majority opinion to guide them in determining what waters are covered (and what waters may not be covered) by the Act. As a result, two federal judicial circuits currently use one test for determining CWA jurisdiction (the Kennedy significant nexus test), three circuits use both the Kennedy and the Scalia (relatively permanent waters) test, and the remaining circuits have not decided which test to use.

## **PRIOR ADMINISTRATIVE ACTIONS**

Since the *SWANCC* and *Rapanos* decisions, the EPA and the Corps have issued several guidance documents to interpret how the agencies will implement these decisions, and these interpretations have varied depending on the Presidential administration in office at the time they were drafted. In simplest terms, the Clinton administration first interpreted the Court's decision in *SWANCC* very narrowly – providing the Corps and EPA the authority to maintain broad CWA protection over waters.

The Bush administration chose a more expansive reading of these cases, and issued guidance that narrowed the reach of CWA protections; however, in doing so, the Bush administration also imposed a water-by-water “jurisdictional determination” test that required the Corps (and EPA) to demonstrate the physical connection between each and every permit application to some downstream “traditionally navigable water.” This new, and extremely fact-intensive, requirement dramatically slowed the process (and increased the cost) of determining whether a waterbody (or wetland) was even covered by the CWA, a process that must be completed before the merits of the actual permit application, itself, can be evaluated and issued. The Bush guidance also required Corps' districts to check with Corps HQ on any water that might be considered “geographically isolated”, further increasing the time (and cost) required for permit applications.

As a result, the regulated community, conservation and environmental organizations, and several States note that the current process, as outlined by the 2003 and 2008 guidance documents, remains confusing, inconsistent, and costly, and provides little environmental benefit. According to the Corps, as a result of this uncertainty, over 66 percent of permit applicants currently use a process to concede CWA jurisdiction rather than maneuver through the formal process.

## **RECENT ADMINISTRATIVE ACTIONS**

In response, the Obama administration has proposed a new Clean Water rulemaking that, the administration believes, will address some of the uncertainty and bureaucratic process related to whether a waterbody (or wetland) is covered by the CWA. This proposed Clean Water rule would authorize the Corps (and EPA) to use tests specifically outlined by the Supreme Court to avoid using a case-by-case determination for every CWA permit application, as well as outline a framework for asserting CWA protections for other waters that have traditionally been covered by the CWA.

## **ADDITIONAL BACKGROUND INFORMATION**

### **EPA's *Connectivity of Streams and Wetlands to Downstream Waters Report*:**

On January 15, 2015, EPA's Office of Research and Development finalized a report<sup>1</sup> that reviewed more than 1,200 peer-reviewed publications and summarizes current scientific understanding about the connectivity and mechanisms by which streams and wetlands, singly or in the aggregate, affect the physical, chemical, and biological integrity of downstream waters.

This report reaches five major conclusions:

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<sup>1</sup> <http://cfpub.epa.gov/ncea/cfm/recorddisplay.cfm?deid=296414>.

- The scientific literature unequivocally demonstrates that streams, regardless of their size or frequency of flow, are connected to downstream waters and strongly influence their function.
- The scientific literature clearly shows that wetlands and open waters in riparian areas (transitional areas between terrestrial and aquatic ecosystems) and floodplains are physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality. These systems act as effective buffers to protect downstream waters from pollution and are essential components of river food webs.
- There is ample evidence that many wetlands and open waters located outside of riparian areas and floodplains, even when lacking surface water connections, provide physical, chemical, and biological functions that could affect the integrity of downstream waters. Some potential benefits of these wetlands are due to their isolation rather than their connectivity. Evaluations of the connectivity and effects of individual wetlands or groups of wetlands are possible through case-by-case analysis.
- Variations in the degree of connectivity are determined by the physical, chemical and biological environment, and by human activities. These variations support a range of stream and wetland functions that affect the integrity and sustainability of downstream waters.
- The literature strongly supports the conclusion that the incremental contributions of individual streams and wetlands are cumulative across entire watersheds, and their effects on downstream waters should be evaluated within the context of other streams and wetlands in that watershed.

In 2013, EPA released an earlier draft of this connectivity report, and invited review of the report by EPA’s Science Advisory Board (SAB). In October, 2014, the SAB completed its review of this report and, generally, concluded that the report is a “through and technically accurate review of the [scientific] literature on the connectivity of streams and wetlands to downstream waters.”<sup>2</sup>

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[http://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21cf85256eba00436459/AF1A28537854F8AB85257D74005003D2/\\$File/EPA-SAB-15-001+unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21cf85256eba00436459/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf).